MEMORANDUM

Re: Power of President as Commander in Chief of Military Forces of the United States.

It may be stated at the very outset, that any extended survey of the authorities dealing with the power of the President of the United States as Commander in Chief of the land and naval forces irresistibly compels the conclusion that such power is no more capable of exact definition than the power of Congress to regulate commerce, but like such latter power, the scope and meaning of the President's power must be arrived at through the application of the process of inclusion and exclusion.

The President's power, of course, stems from Section 2 of Article II of the Constitution, and must initially be construed in the light of certain other provisions of the Constitution which confer upon the Congress military and war powers, some of which would seem to otherwise fall within the reasonable powers of a Commander in Chief. The various Constitutional provisions thus requiring to be read together are the following:

Section 2 of Article II reads as follows:

> "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . ."

Article I, Section 8, declares Congress shall have power -

> "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
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> "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
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> "To provide and maintain a Navy;
>
> "To make Rules for the Government and Regulation of the land and naval Forces;
>
> "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> "To provide for organizing, arming, and discipling, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;"

The foregoing provisions appear to leave with the Congress dominant power over the land and naval forces, and to that extent considerably restrict the power of the President as Commander in Chief in fields where, absent such provisions, his will would reasonably be expected to control.

As will hereinafter be revealed, notwithstanding the reservation in Congress of dominant control over war and military affairs, there were apprehensions that

even the restricted power granted the President might well constitute a danger to the people if such powers were at any time exerted by an personally ambitious President. Some of those apprehensions appear in Elliott's Debates, now to be quoted.

I

ELLIOTT'S DEBATES

In the North Carolina Convention, called for consideration of the adoption of the proposed Federal Constitution, the following remarks occurred in connection with the Commander in Chief provision (Elliott's Debates, Vol. IV, pp. 107-108, 114-115):

> "Mr. IREDELL. Mr. Chairman, I was in hopes that some other gentleman would have spoken to this clause. It conveys very important powers, and ought not to be passed by. I beg leave, in as few words as possible, to speak my sentiments upon it. I believe most of the governors of the different states have powers similar to those of the President. In almost every country, the executive has the command of the military forces. From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person. The President, therefore, is to command the military forces of the United States, and this power I think a proper one; at the same time it will be found to be sufficiently guarded. A very material difference may be observed between this power, and the authority of the king of Great Britain under similar circumstances. The king of Great Britain is not only the commander-in-chief of the land and naval forces, but has power, in time of war, to raise fleets and armies. He has also authority to declare war. The President has not

the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands. The power of declaring war is expressly given to Congress, that is, to the two branches of the legislature --the Senate, composed of representatives of the state legislatures, the House of Representatives, deputed by the people at large. They have also expressly delegated to them the powers of raising and supporting armies, and of providing and maintaining a navy.

"With regard to the militia, it must be observed, that though he has the command of them when called into the actual service of the United States, yet he has not the power of calling them out. The power of calling them out is vested in Congress, for the purpose of executing the laws of the Union. When the militia are called out for any purpose, some person must command them; and who so proper as that person who has the best evidence of his possessing the general confidence of the people? I trust, therefore, that the power of commanding the militia, when called forth into the actual service of the United States, will not be objected to.

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"Mr. MILLER acknowledged that the explanation of this clause by the member from Edenton had obviated some objections which he had to it; but still he could not entirely approve of it. He could not see the necessity of vesting this power in the President. He thought that his influence would be too great in the country, and particularly over the military, by being the commander-in-chief of the army, navy, and militia. He thought he could too easily abuse such extensive powers, and was of opinion that Congress ought to have power to direct the motions of the army. He considered it as a defect in the Constitution, that it was not expressly provided that Congress should have the direction of the motions of the army.

"Mr. SPAIGHT answered, that it was true that the command of the army and navy was given to the President; but that Congress, who had the power of raising armies, could certainly prevent any abuse of that authority in the President--that

they alone had the means of supporting armies, and that the President was impeachable if he in any manner abused his trust. He was surprised that any objection should be made to giving the command of the army to one man; that it was well known that the direction of an army could not be properly exercised by a numerous body of men; that Congress had, in the last war, given the exclusive command of the army to the commander-in-chief, and that if they had not done so, perhaps the independence of America would not have been established."

In the Virginia Convention, the following remarks were made (Idem. Vol. III, pp. 59-60, 496-498):

"MR. HENRY: If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute! The army is in his hands, and if he be a man of address, it will be attached to him, and it will be the subject of long meditation with him to seize the first auspicious moment to accomplish his design; and, sir, will the American spirit solely relieve you when this happens? I would rather infinitely -- and I am sure most of this Convention are of the same opinion -- have a king, lords, and commons, than a government so replete with such insupportable evils. If we make a king, we may prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them; but the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke. I cannot with patience think of this idea. If ever he violates the laws, one of two things will happen: he will come at the head of his army, to carry every thing before him; or he will give bail, or do what Mr. Chief Justice will order him. If he be guilty, will not the recollection of his crimes teach him to make one bold push for the American throne. Will not the immense difference between being master of every thing, and being ignominiously tried and punished, powerfully excite him to make this bold push? But, sir, where is the existing force to punish him? Can he not, at the head of his

army, beat down every opposition? Away with your President! we shall have a king: the army will salute him monarch: your militia will leave you, and assist in making him king, and fight against you: and what have you to oppose this force? What will then become of you and your rights? Will not absolute despotism ensue?

* * * * *

"MR. GEORGE MASON, animadverting on the magnitude of the powers of the President, was alarmed at the additional power of commanding the army in person. He admitted the propriety of his being commander-in-chief, so far as to give orders and have a general superintendency, but he thought it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. He was, then, clearly of opinion that the consent of a majority of both houses of Congress should be required before he could take the command in person. If at any time it should be necessary that he should take the personal command, either on account of his superior abilities or other cause, then Congress would agree to it; and all dangers would be obviated by requiring their consent. He called to gentlemen's recollection the extent of what the late commander-in-chief might have done, from his great abilities, and the strong attachment of both officers and soldiers towards him, if, instead of being disinterested, he had been an ambitious man. So disinterested and amiable a character as General Washington might never command again. The possibility of danger ought to be guarded against. Although he did not disapprove of the President's consultation with the principal executive officers, yet he objected to the want of an executive council, which he conceived to be necessary to any regular free government. There being none such, he apprehended a council would arise out of the Senate, which, for want of real responsibility, he thought dangerous. . . .

"MR. LEE reminded his honorable friend that it did not follow, of necessity, that the President should command in person; that he was to command as a civil officer, and might only take the command when he was a man of military talents, and the public safety required it. . . .

"MR. MASON replied, that he did not mean that the President was of necessity to command, but he might if he pleased; and if he was an ambitious man, he might make a dangerous use of it.

"MR. GEORGE NICHOLAS hoped the committee would not advert to this; that the army and navy were to be raised by Congress, and not by the President. It was on the same footing with our state government; for the governor, with the council, was to imbody the militia, but, when actually imbodied, they were under the sole command of the governor. The instance adduced was not similar. General Washington was not a President. As to possible danger, any commander might attempt to pervert what was intended for the common defence of the community to its destruction. The President, at the end of four years, was to relinquish all his offices. But if any other person was to have the command, the time would not be limited.

"MR. MASON answered, that it did not resemble the state Constitution, because the governor did not possess such extensive powers as the President, and had no influence over the navy. The liberty of the people had been destroyed by those who were military commanders only. The danger here was greater by the junction of great civil powers to the command of the army and fleet. Although Congress are to raise the army, said he, no security arises from that; for, in time of war, they must and ought to raise an army, which will be numerous, or otherwise, according to the nature of the war, and then the President is to command without any control."

II

THE FEDERALIST

The following excerpt from The Federalist, No. 69, (Hamilton) thus deals with the President as Commander-in-Chief of the land and naval forces:

" . . . The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be

called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor. Secondly. The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies,--all which, by the Constitution under consideration, would appertain to the legislature. The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commander-in-chief, as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States. . . ." (pp.448-449)

III
THE JUDICIAL DECISIONS

The decision of the Supreme Court dealing with the respective powers of Congress and the President in the military field, furnish enumerable guide posts in determining the scope of the President's military powers. It would seem to be more helpful to consider those decisions chronologically so far as such plan may be feasible.

In Little et al. v. Barreme et al., 2 Cranch. 170, 177 (1804), the statute authorized the President to

instruct naval commanders to seize any vessel bound or sailing to any port or place within the French Republic or her dependencies. While the commander here involved was found to have seized a vessel not within the statute, and therefore liable in damages for such unlawful seizure, the Court said (p. 177):

> "It is by no means clear that the president of the United States whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. . . ."

Martin v. Mott, 12 Wheat. 19, 29-32 (1827), is useful as upholding the finality of the President's determination of the existence of an emergency requiring military action. That case involved at base, the validity of trial by court martial of a militiaman who failed to respond to the President's call to service. The Court said (pp. 29, 30, 31, 32):

> " . . . It has not been denied here, that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to

provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

"The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If 'the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence,

and of watching over the internal peace of the confederacy,' these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

" . . . The power itself is confided to the Executive of the Union, to him who is, by the constitution, 'the commander in chief of the militia, when called into the actual service of the United States,' whose duty it is to 'take care that the laws be faithfully executed,' and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and

exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."

United States v. Eliason, 16 Pet. 291 (1842), shows the power of the President to act through his Secretary of War. That case involved the claim of an army officer to extra pay in the face of regulations to the contrary. The Court said (pp. 301-302):

" . . . The power of the executive to establish rules and regulations for the government of the army, is undoubted. The very appeal made by the defendant to the fourteenth section of the sixty-seventh article of the Army Regulations, is a recognition of this right. The power to establish implies, necessarily, the power to modify or repeal, or to create anew.

"The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulged through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority.

"Such regulations cannot be questioned or defied, because they may be thought unwise or mistaken. The right of so considering and treating the authority of the executive, vested as it is with the command of the military and naval

forces, could not be entrusted to officers of any grade inferior to the commander-in-chief, its consequences, if tolerated, would be a complete disorganization of both the army and navy. In the present instance, the order was adopted by the proper authority, and by the same authority promulged to every officer, through the regular official organ; and the question propounded to the Circuit Court was neither more nor less than this, whether a subordinate officer of the army, insisting upon a prior regulation, which he thinks either is or ought to be in force, shall obtain from the government emoluments which a subsequent order from his superior had warned him that it was not in his power to require? This question can need no argument for its solution. This Court are, therefore, of opinion that the Circuit Court have erred in allowing to Captain Eliason, a per diem, as disbursing officer at Fortress Calhoun, subsequently to the 3d day of March, 1835. . . ."

Fleming et al. v. Page, 9 How. 603 (1850) involved the right to collect duties on goods coming into the United States from Tampico, Mexico, while that territory was held by our troops under military occupation. Among other things, the Court said (pp. 614-618):

"The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time of the shipment subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out, or had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President. . . .

* * *

"A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United

States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

"It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

"But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his

government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged, and every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made.

"Again, there was no act of Congress establishing a custom-house at Tampico, nor authorizing the appointment of a collector; and, consequently, there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port of the United States to another. The person who acted in the character of collector in this instance, acted as such under the authority of the military commander, and in obedience to his orders; and the duties he exacted, and the regulations he adopted, were not those prescribed by law, but by the President in his character of commander-in-chief. The custom-house was established in an enemy's country, as one of the weapons of war. It was established, not for the purpose of giving to the people of Tamaulipas the benefits of commerce with the United States, or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country. . . .

* * *

"In the view we have taken of this question, it is unnecessary to notice particularly the passages from eminent writers on the laws of nations which were brought forward in the argument. They speak altogether of the rights which a sovereign acquires, and the powers he may exercise in a conquered country, and they do not bear upon the question we are considering. For in this country the sovereignty of the United States resides in the people of the several States, and they act through their representatives, according to the delegation and distribution of powers contained in the Constitution. And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, neither claimed nor exercised any rights or powers in relation to the territory in question but the rights of war. After it was subdued, it was uniformly treated as an enemy's country, and restored to the possession of the Mexican authorities when peace was concluded. And certainly its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.

"Neither is it necessary to examine the English decisions which have been referred to by counsel. It is true that most of the states have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide. . . ."

Mitchell v. Harmony, 13 How. 115 (1851) involved a claim for damages for property taken over during the war with Mexico. The Court said (pp. 129-130, 133-136):

> "When Colonel Doniphan commenced his march for Chihuahua, the plaintiff and the other traders continued to follow in the rear and trade with the inhabitants, as opportunity offered. But after they had entered that province and were about to proceed in an expedition against the city of that name, distant about 300 miles, the plaintiff determined to proceed no further, and to leave the army. And when this determination was made known to the commander at San Elisario he gave orders to Colonel Mitchell, the defendant, to compel him to remain with and accompany the troops. Colonel Mitchell executed the order, and the plaintiff was forced, against his will, to accompany the American forces with his wagons, mules and goods, in that hazardous expedition.
>
> "Shortly before the battle of Sacramento, which was fought on the march to the town of Chihuahua, Colonel Doniphan, at the request of the plaintiff, gave him permission to leave the army and to to the hacienda of a Mexican by the name of Parns, about eight miles distant, with his property. But the plaintiff did not avail himself of this permission; and apprehended, upon more reflection, that his property would be in more danger there than with the army; and that a voluntary acceptance on his part, and resuming the possession at his own risk, would deprive him of any remedy for its loss if it should be taken by the Mexican authorities. He remained therefore with the troops until they entered the town. His wagons and mules were used in the public service in the battle of Sacramento, and on the march afterwards. And while the town remained in possession of the American forces he endeavored, but without success, to dispose of his goods. When the place was evacuated they were therefore unavoidably left behind, as nearly all of his mules had been lost in the march and the battle. He himself accompanied the army, fearing that his person would not be safe if he remained behind, as he was particularly obnoxious, it seems, to the Mexicans, because he was a native of Spain, and came with a hostile invading army.

"When the Mexican authorities regained possession of the place, the goods of the plaintiff were seized and confiscated, and were totally lost to him. And this action was brought against Colonel Mitchell, the defendant, in the court below, to recover the damages which the plaintiff alleged he had sustained by the arrest and seizure of his property at San Elisario, and taking it from his control and legal possession.

* * *

" . . . The defence has been placed, rather on rumors which reached the commanding officer and suspicions which he appears to have entertained of a secret design in the plaintiff to leave the American forces and carry on an illicit trade with the enemy, injurious to the interests of the United States. And if such a design had been shown, and that he was preparing to leave the American troops for that purpose, the seizure and detention of his property, to prevent its execution, would have been fully justified. But there is no evidence in the record tending to show that these rumors and suspicions had any foundation. And certainly mere suspicions of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence.

"The 2d and 3d objections will be considered together, as they depend on the same principles. Upon these two grounds of defence the Circuit Court instructed the jury, that the defendant might lawfully take possession of the goods of the plaintiff, to prevent them from falling into the hands of the public enemy; but in order to justify the seizure the danger must be immediate and impending, and not remote or contingent. And that he might also take them for public use and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise.

* * *

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress

private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

"But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

"In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good.

* * *

". . . Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.

"The case mentioned by Lord Mansfield, in delivering his opinion in Mostyn v. Fabrigas, 1 Cowp. 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed.

"This case shows how carefully the rights of private property are guarded by the laws in England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States."

Cross et al. v. Harrison, 16 How. 164 (1853), was a suit to recover back duties alleged to have been illegally exacted on goods imported into California during military occupation. The Court said (pp. 190-191, 201):

"California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterward the United States had military possession of all of Upper California. Early in 1847 the President, as constitutional commander-in-chief of the army and navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession. We will add, by way of note to this opinion, references to all of the correspondence of the government upon this subject; now only referring to the letter of the Secretary at War to General Kearney, of the 10th of May, 1847, which was accompanied with a tariff of duties

on imports and tonnage, which had been prepared by the Secretary of the Treasury, with forms of entry and permits for landing goods, all of which was reported by the Secretary to the President on the 30th of March, 1847. Senate Doc. No. 1, 1st session, 30th Congress, 1847, pp. 567, 583. No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. . . .

"The plaintiffs therefore can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. Until that time California had not been ceded, in fact, to the United States, but it was a conquered territory, within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandises, they were paid under them.

* * *

" . . . The plaintiffs carried these goods voluntarily into California, knowing the state of things there. They knew that there was an existing civil government instituted by the authority of the President, as commander-in-chief of the army and naval forces of the United States, by the right of conquest; . . ."

Dynes v. Hoover, 20 How. 65 (1857). This was an action for damages growing out of the incarceration of a naval seaman pursuant to a conviction by a naval court martial. The Court said (pp. 78-79, 82-84):

" . . . Among the powers conferred upon Congress by the 8th section of the first article of the Constitution, are the following: 'to provide and maintain a navy;' 'to make rules for the government of the land and naval forces.' And the 8th amendment, which requires a presentment of a grand jury in cases of capital or otherwise

infamous crime, expressly excepts from its operation 'cases arising in the land or naval forces.' And by the 2d section of the 2d article of the Constitution it is declared that 'The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States.'

"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

* * *

"Courts martial derive their jurisdiction and are regulated with us by an act of Congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms; or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends, and that the Legislature meant to subject to punishment one of a minor degree of a kindred character, which has already been recognized to be such by the practice of courts martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts martial. And when offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. . . .

"Such is the law of England. By the mutiny acts, courts martial have been created, with authority to try those who are a part of the army or navy for breaches of military or naval duty. . . .

"In this case, all of us think that the court which tried Dynes had jurisdiction over the subject-matter of the charge against him; that the

sentence of the court against him was not forbidden by law; and that, having been approved by the Secretary of the Navy as a fair deduction from the 17th article of the act of April 23d, 1800, and that Dynes having been brought to Washington as a prisoner by the direction of the Secretary, that the President of the United States, as constitutional commander-in-chief of the army and navy, and in virtue of his constitutional obligation, that 'He shall take care that the laws be faithfully executed,' violated no law in directing the marshal to receive the prisoner Dynes from the officer commanding the United States steamer Engineer, for the purpose of transferring him to the penitentiary of the District of Columbia; and, consequently, that the marshal is not answerable in this action of trespass and false imprisonment."

The Brig Warwick et al (Prize Cases) 2 Black. 635 (1862), involved seizures of vessels operating in violation of a blockade proclaimed by the President without any prior authorization by Congress. The Court said (pp. 666-671):

"War has been well defined to be, 'That state in which a nation prosecutes its right by force.'

"The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.

"Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents--the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the

world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

"The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

" 'A civil war,' says Vattel, 'breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

" 'This being the case, it is very evident that the common laws of war--those maxims of humanity, moderation, and honor--ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c; the war will become cruel, horrible, and every day more destructive to the nation.'

"As a civil war is never publicly proclaimed, eo nomine against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

"The true test of its existence, as found in the writing of the sages of the common law, may be thus summarily stated: 'When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land.

"By the Constitution, Congress alone has the power to declare a national or foreign war. It

cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

"If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.' Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other.'

"The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13th, 1846, which recognized 'a state of war as existing by the act of the Republic of Mexico.' This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

"This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

* * *

"Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

* * *

"On this first question therefore we are of the opinion that the President had a right, jure belli, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard."

Ex Parte Milligan, 4 Wall. 1 (1866) involved the validity of a conviction of a non-military person, by a court martial. The Court said (pp. 107, 118, 121-130):

"On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana; and has ever since been kept in close confinement.

"On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

* * *

"The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in its jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

* * *

" . . . This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

" . . . If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and confort to rebels, and incited the people to insurrection,' the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

* * *

"The discipline necessary to the efficiency of the army and navy, required other and swifter models of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. . . .

"It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

"If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'--the attempt to do which

by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

* * * * *

"It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

"It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or

civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.'

* * * * *

"In some parts of the country, during the war of 1812, our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of Smith v. Shaw and McConnell v. Hampden (reported in 12 Johnson), are illustrations, which we cite, not only for the principles they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

* * * * *

"It is proper to say, although Milligan's trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment. Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an enormous crime when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by

> stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of of the United States. Conspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct. . . .

The Grapeshot, 9 Wall. 129 (1869), was a libel suit, and involved military occupation of Louisiana during the Civil War. The Court said (pp. 132-133):

> "That the late rebellion, when it assumed the character of civil war, was attended by the general incidents of a regular war, has been so frequently declared here that nothing further need be said on that point.
>
> "The object of the National government, indeed, was neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority. But in the attainment of these ends, through military force, it became the duty of the National government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.
>
> "The duty of the National government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held.
>
> "What that duty is, when the territory occupied by the National forces is foreign territory, has been declared by this court in several cases arising from such occupation during the late war with Mexico. In the case of Leitensdorfer v. Webb, the authority of the officer holding possession for the United States to establish a provisional government was

sustained; and the reasons by which that judgment was supported, apply directly to the establishment of the Provisional Court in Louisiana. The cases of Jecker v. Montgomery, and Cross v. Harrison, may also be cited in illustration of the principles applicable to military occupation.

"We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during war; or that Congress had power, upon the close of the war, and the dissolution of the Provisional Court, to provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States."

Miller v. United States, 11 Wall. 268 (1870), involved a suit to forfeit certain property under the so-called Confiscation Acts. The Court said (pp. 305-306, 308, 311-312):

" . . . Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and water. It is argued that though there are no express constitutional restrictions upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. Hence it is said the power to prosecute war is only a power to prosecute it according to the law of nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case. It is sufficient that the right to confiscate the property of all public enemies is a conceded right. . . .

The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.

"It is also to be observed that when the acts of 1861 and 1862 were passed, there was a state of war existing between the United States and the rebellious portions of the country. Whether its beginning was on the 27th or the 30th of April, 1861, or whether it was not until the act of Congress of July 13th of that year, is unimportant to this case, for both acts were passed after the existence of war was alike an actual and a recognized fact. War existing, the United States were invested with belligerent rights in addition to the sovereign powers previously held. Congress had then full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the government. It is true the war was not between two independent nations. But because a civil war, the government was not shorn of any of those rights that belong to belligerency. . . .

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" . . . It is the act of 1862, the constitutionality of which has been principally assailed. That act had several purposes, as indicated in its title. As described, it was 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes.' The first four sections provided for the punishment of treason, inciting or engaging in rebellion or insurrection, or giving aid and comfort thereto. They are aimed at individual offenders, and they were undoubtedly an exercise of the sovereign, not the belligerent rights of the government. But when we come to the fifth and the following sections we find another purpose avowed, not punishing treason and rebellion, as described in the title, but that other purpose,

described in the title, as 'seizing and confiscating the property of rebels.' The language is, 'that to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States.' . . .

* * * * *

" . . . But even in foreign wars persons may be enemies who are not inhabitants of the enemy's territory. The laws of nations nowhere declare the contrary. And it would be strange if they did, for those not inhabitants of a foreign state may be more potent and dangerous foes than if they were actually residents of that state. By uniting themselves to the cause of a foreign enemy they cast in their lot with his, and they cannot be permitted to claim exemptions which the subjects of the enemy do not possess. Depriving them of their property is a blow against the hostile power quite as effective, and tending quite as directly to weaken the belligerent with whom they act, as would be confiscating the property of a non-combatant resident. Clearly, therefore, those must be considered as public enemies, and amenable to the laws of war as such, who, though subjects of a state in amity with the United States, are in the service of a state at war with them, and this not because they are inhabitants of such a state, but because of their hostile acts in the war. Even under municipal law this doctrine is recognized. . . .

"Still less is it true that the laws of nations have defined who, in the case of a civil war, are to be regarded and may be treated as enemies. Clearly, however, those must be considered such who, though subjects or citizens of the lawful government, are residents of the territory under the power or control of the party resisting that government. Thus much may be gathered from the Prize Cases. And why are not all who act with that party? Have they not voluntarily subjected themselves to that party; identified themselves with it? And is it not as important to take from them the sinews of war, their property, as it is to confiscate the property of rebel enemies resident within the rebel territory? It is hard to conceive of any reason for confiscating the property of one class that does not equally justify confiscating the property of the other. We have already said

> that no recognized usage of nations excludes from the category of enemies those who act with, or aid or abet and give comfort to enemies, whether foreign or domestic, though they may not be residents of enemy's territory. It is not without weight, that when the Constitution was formed its framers had fresh in view what had been done during the Revolutionary war. Similar statutes for the confiscation of property of domestic enemies, of those who adhered to the British government, though not residents of Great Britain, were enacted in many of the States, and they have been judicially determined to have been justified by the laws of war. They show what was then understood to be confiscable property, and who were public enemies. At least they show the general understanding that aiders and abettors of the public enemy were themselves enemies, and hence that their property might lawfully be confiscated. It was with these facts fresh in memory, and with a full knowledge that such legislation had been common, almost universal, that the Constitution was adopted. . . ."

The basis of the above decision, namely the laws of war, would seem to warrant seizures by the President as Commander in Chief without legislative direction or permission.

United States v. Russell, 13 Wall. 623 (1871), involved a claim for damages growing out of the seizure of certain vessels by the military authorities in 1863 and 1864 for military purposes. The Court said (pp. 627-628):

> "Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive

the owner of his property without his consent. Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate,public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner."

New Orleans v. Steamship Co., 20 Wall. 387 (1874), was an injunction and damage suit growing out of the action of the military authorities. The Court said (pp. 387-388, 393-394):

> "On the 1st of May, 1862, the army of the United States captured the city of New Orleans. It was held by military occupation until the 18th of March, 1866, when its government was handed over to the proper city authorities. The condition of things which subsisted before the rebellion, was then restored. During the military occupation it was governed by a mayor, a board of finance, and a board of street landings, appointed by the commanding general of the department. On the 8th of June, 1865, Hugh Kennedy was thus appointed mayor. On the 8th of July, 1865, as such mayor, pursuant to a resolution signed by the chairman of the board of finance and by the chairman of the board of street landings, both boards having been appointed in the same manner as himself, Kennedy executed to the appellees a lease of certain water-front property therein described. . . .
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> "Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject.

* * * * *

"It can hardly be doubted that to contract for the use of a portion of the water-front of the city during the continuance of the military possession of the United States was within the scope of their authority. But, conceding this to be so, it is insisted that when the military jurisdiction terminated the lease fell with it. We cannot take this view of the subject. . . ."

Hamilton v. Dillin, 21 Wall. 73 (1874), was a suit to recover certain fees imposed during the Civil War. The Court said (pp. 87-88):

" . . . By the Constitution of the United States the power to declare war is confided to Congress. The executive power and the command of the military and naval forces is vested in the President. Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject. In the case of Cross v. Harrison, it was held that the President, as commander-in-chief, had power to form a temporary civil government for California as a conquered country, and to impose duties on imports and tonnage for the support of the government and for aiding to sustain the burdens of the war, which were held valid until Congress saw fit to supersede them; and an action brought to recover back duties paid under such regulation was adjudged to be not maintainable. The same views were held in Leitensdorfer et al. v. Webb, in reference to the establishment of a provisional government in New Mexico, in the war with Mexico in 1846, and were reiterated by this court in the case of The Grapeshot."

Mechanics and Traders Bank v. Union Bank, 22 Wall. 276 (1874) involved the validity of a judgment of a court

constituted by the military authorities. The Court said (pp. 294-297):

> "The argument of the plaintiffs in error is that the establishment of the Provost Court, the appointment of the judge, and his action as such in the case brought by the Union Bank against them were invalid, because in violation of the Constitution of the United States, which vests the judicial power of the General government in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, and that under this constitutional provision they were entitled to immunity from any liability imposed by the judgment of the Provost Court. Thus, it is claimed, a Federal question is presented, and the highest court of the State having decided against the immunity claimed, our jurisdiction is invoked.
>
> "Assuming that the case is thus brought within our right to review it, the controlling question is whether the commanding general of the army which captured New Orleans and held it in May, 1862, had authority after the capture of the city to establish a court and appoint a judge with power to try and adjudicate civil causes. Did the Constitution of the United States prevent the creation of civil courts in captured districts during the war of the rebellion, and their creation by military authority?
>
> "This cannot be said to be an open question. The subject came under consideration by this court in The Grapeshot, where it was decided that when, during the late civil war, portions of the insurgent territory were occupied by the National forces, it was within the constitutional authority of the President, as commander in chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the State or of the United States, and it was ruled that a court instituted by President Lincoln for the State of Louisiana, with authority to hear, try, and determine civil causes, was lawfully authorized to exercise such jurisdiction. Its establishment by military authority was held to be no violation of the constitutional provision that 'the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.' That clause of the Constitution has no application to the abnormal condition of conquered territory in the occupany of the conquering army. . . . 'The duty of the

National government in this respect was no other than that which devolves upon a regular belligerent, occupying during war the territory of another belligerent. It was a military duty, to be performed by the President, as commander in chief, and intrusted as such with the direction of the military force by which the occupation was held.'

"Thus it has been determined that the power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent States occupied by the National forces, is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors. What that power is has several times been considered. In Leitensdorfer & Houghton v. Webb, may be found a notable illustration. Upon the conquest of New Mexico, in 1846, the commanding officer of the conquering army, in virtue of the power of conquest and occupancy, and with the sanction and authority of the President, ordained a provisional government for the country. The ordinance created courts, with both civil and criminal jurisdiction. It did not undertake to change the municipal laws of the territory, but it established a judicial system with a superior or appellate court, and with circuit courts, the jurisdiction of which was declared to embrace, first, all criminal causes that should not otherwise be provided for by law; and secondly, original and exclusive cognizance of all civil cases not cognizable before the prefects and alcaldes. But though these courts and this judicial system were established by the military authority of the United States, without any legislation of Congress, this court ruled that they were lawfully established. And there was no express order for their establishment emanating from the President or the commander in chief. The ordinance was the act of General Kearney, the commanding officer of the army occupying the conquered territory.

"In view of these decisions it is not to be questioned that the constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent States. The establishment of such courts is but the exercise of the ordinary rights of conquest. The plaintiff's in error, therefore, had no constitutional immunity against subjection to the judgments of such courts. They argue, however, that if this be

conceded, still General Butler had no authority to establish such a court; that the President alone, as commander in chief, had such authority. We do not concur in this view. General Butler was in command of the conquering and occupying army. He was commissioned to carry on the war in Louisiana. He was, therefore, invested with all the powers of making war, except so far as they were denied to him by the commander in chief, and among these powers, as we have seen, was that of establishing courts in conquered territory. It must be presumed that he acted under the orders of his superior officer, the President, and that his acts, in the prosecution of the war, were the acts of his commander in chief."

Mathews v. McStea, 91 U.S. (1 Otto) 7 (1875) was an action on the acceptance of a bill of exchange. The Court said (pp. 10-11):

"'. . . A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus sometimes a mutual commerce is permitted generally; sometimes as to certain merchandise only, while others are prohibited; and sometimes it is prohibited altogether.' Halleck, in his 'Treatise on the Laws of War,' p. 676 et seq., discusses this subject at considerable length, and remarks, 'That branch of the government to which, from the form of its constitution, the power of declaring or making war is intrusted, has an undoubted right to regulate and modify, in its discretion, the hostilities which it sanctions. . . . In England, licenses are granted directly by the crown, or by some subordinate officer to whom the authority of the crown has been delegated, either by special instructions, or under an act of Parliament. In the United States, as a general rule, licenses are issued under the authority of an act of Congress; but in special cases, and for purposes immediately connected with the prosecution of the war, they may be granted by the authority of the President, as commander-in-chief of the military and naval forces of the United States.'"

Totten v. United States, 92 U.S. (2 Otto) 105, was a suit to recover for services rendered President Lincoln in procuring information regarding activities of the Confederate military. The Court said (p. 106):

> "We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control. . . ."

Coleman v. Tennessee, 97 U.S. (7 Otto) 509 (1878), is helpful as outlining the differing Congressional and Commander in Chief powers. The case presented the question whether a court martial had exclusive jurisdiction over an offence committed during war by a soldier. The Court said: (pp. 514-517)

> "We do not mean to intimate that it was not within the competency of Congress to confer exclusive jurisdiction upon military courts over offences committed by persons in the military service of the United States. As Congress is expressly authorized by the Constitution 'to raise and support armies,' and 'to make rules for the government and regulation of the land and naval forces,' its control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offences committed by persons in the military service, would seem to be plenary. All we now affirm is, that by the law to which we are referred, the thirtieth section of the Enrolment Act, no such exclusive jurisdiction is vested in the military tribunals mentioned. . . .

"In denying to the military tribunals exclusive jurisdiction, under the section in question, over the offences mentioned, when committed by persons in the military service of the United States and subject to the articles of war, we have reference to them when they were held in States occupying, as members of the Union, their normal and constitutional relations to the Federal Government, in which the supremacy of that government was recognized, and the civil courts were open and in the undisturbed exercise of their jurisdiction. When the armies of the United States were in the territory of insurgent States, banded together in hostility to the national government and making war against it, in other words, when the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offences committed by them. They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished.

* * * * * *

"The fact that when the offence was committed, for which the defendant was indicted, the State of Tennessee was in the military occupation of the United States, with a military governor at its head, appointed by the President, cannot alter this conclusion. . . .

" . . . The right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition; and the character and form of the government to be established depend entirely upon the laws of the conquering State or the orders of its military commander. By such occupation the political relations between the people of the hostile country and their former government or sovereign are for the time severed; but the municipal laws -- that is, the laws which regulate private rights, enforce contracts, punish crime, and regulate the transfer of property -- remain in full

force, so far as they affect the inhabitants of the country among themselves, unless suspended or superseded by the conqueror. And the tribunals by which the laws are enforced continue as before, unless thus changed. In other words, the municipal laws of the State, and their administration, remain in full force so far as the inhabitants of the country are concerned, unless changed by the occupying belligerent. Halleck, Int. Law, c. 33."

Dow v. Johnson, 100 U.S. (10 Otto) 158 (1879), was a suit for damages growing out of a military seizure of private property. The Court said (pp. 161-163, 167-168):

"The second plea, in substance, sets up that as early as February, 1861, the State of Louisiana adopted an ordinance of secession, by which she attempted to withdraw from the Union and establish an independent government; that from that time until after April 9, 1863, the date of the judgment in question, she was in rebellion against the government of the United States, making war against its authority; that in consequence the military forces of the United States engaged in suppressing the rebellion took forcible possession of that portion of the State comprising the district of the Sixth District Court of New Orleans, and held military occupation of it until long after April 9, 1863, during which time martial law was established there and enforced; that the defendant was then a brigadier-general in the military service of the United States, duly commissioned by the President, and acting in that State under his orders and the articles of war; that by the general order of the President of July 22, 1862, military commanders within the States of Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas were directed, in an orderly manner, to seize and use any property, real or personal, which might be necessary or convenient for their several commands as supplies, or for other military purposes; that the defendant, in the performance of his duty as a brigadier-general was in command of troops of the United States in Louisiana; and that the troops by his order seized

from the plaintiff, then a citizen of that State, certain chattels necessary and convenient for supplies for the army of the United States, and other military purposes; and that for that seizure the action was brought in the Sixth District Court of New Orleans against him, in which the judgment in question was rendered; but that the District Court had no jurisdiction of the action or over the defendant at its commencement, or at the rendition of the judgment.

* * * * * *

"The important question thus presented for our determination is, whether an officer of the army of the United States is liable to a civil action in the local tribunals for injuries resulting from acts ordered by him in his military character, whilst in the service of the United States, in the enemy's country, upon an allegation of the injured party that the acts were not justified by the necessities of war.

* * * * * *

"If private property there was taken by an officer or a soldier of the occupying army, acting in his military character, when, by the laws of war, or the proclamation of the commanding general, it should have been exempt from seizure, the owner could have complained to that commander, who might have ordered restitution, or sent the offending party before a military tribunal, as circumstances might have required, or he could have had recourse to the government for redress. But there could be no doubt of the right of the army to appropriate any property there, although belonging to private individuals, which was necessary for its support or convenient for its use. This was a belligerent right, which was not extinguished by the occupation of the country, although the necessity for its exercise was thereby lessened. However exempt from seizure on other grounds private property there may have been, it was always subject to be appropriated, when required by the necessities or convenience of the army, though the owner of property taken in such case may have had a just claim against the government for indemnity."

McElrath v. United States, 102 U.S. (12 Otto) 426 (1880), was a suit to recover compensation by a Marine Corps officer required to resign from the service by the President. The Court said (pp. 437-438):

> "But we are here met with the suggestion that a vacancy did not exist, and Lieutenant Haycock's right to the office did not attach until he received his commission on the thirteenth day of July, 1866, on which day, and from the first moment of that day,--as is claimed upon the authority of United States v. Lapeyre (17 Wall. 191) and United States v. Norton (97 U.S. 164),--it was the law that 'no officer of the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.' Act of July 13, 1866, 14 Stat. 92. To this suggestion one obvious answer is, that the act of July 13, 1866, was not, on that day, in effective operation. That act assumes to control the President, in the matter of dismissing officers from the naval and military service, only in time of peace. Its purpose was, upon the declaration of peace, to suspend the broad power which he exercised during the recent rebellion, when prompt, vigorous action was often demanded, to dismiss an officer from the service whenever, in his judgment, the public interests would thereby promoted. . . ."

Kirk v. Lynd, 106 U.S. (16 Otto) 315 (1882) involved property confiscated during the Civil War. The Court said (pp. 315-318):

> "The single question in this case is, whether the purchaser of real property condemned under the act of Aug. 6, 1861, c. 60, entitled 'An Act to confiscate property used for insurrectionary purposes,' takes a fee, or only an estate for life. The act provides that if during an insurrection against the government of the United States, after the President has declared by proclamation that the laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of

judicial proceedings, or by the power vested in the marshals by law, any person shall purchase or acquire, sell or give, any property with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein; or if any person, being the owner of any such property, shall knowingly use or employ, or consent to the use or employment of the same, as aforesaid, all such property shall be lawful subject of capture and prize wherever found, and the President may cause the same to be seized, confiscated, and condemned. Provision is then made for judicial proceedings of condemnation in the courts of the United States. The seizure and condemnation in the present case were because the property had been used and employed, with the knowledge and consent of the owner, in aid of the insurrection.

"Express authority is vested in Congress by the Constitution to 'make rules concerning captures on land and water.' Art. 1, sect. 8. The statute now in question is manifestly an exercise of that power. As was said by Mr. Justice Strong, in Miller v. United States, 11 Wall. 268, 308: 'It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used to aid, abet, or promote the rebellion, then a war, or to maintain the war against the government. . . .

"In war the capture of property in the hands of the enemy, used, or intended to be used, for hostile purposes, is allowed by all civilized nations, and this whether the ownership be public or private. The title to movable property in hostile use, captured on land, passes to the captor as soon as the capture is complete; that is to say, as soon as the property is reduced to firm possession. . . .

"Property captured in war is not taken to punish its owner any more than the life of a soldier slain in battle is taken to punish him. The property as well as the life is taken only as a means of lessening the warlike strength of the enemy. Young v. United States, 97 U. S. 39."

The reasoning in the above cases would seem to support seizure by President as Commaner in Chief without legislative direction or permission.

Runkle v. United States, 122 U.S. 543 (1886) is an example of a non-delegable military duty of the President. The Court said (p. 557):

> "Here, however, the action required of the President is judicial in its character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the army of the United States shall be dismissed from service as a punishment for an offence with which he has been charged, and for which he has been tried. . . ."

Dooley v. United States, 182 U.S. 222 (1900) was a suit to recover back certain duties levied under military power. The Court said (pp. 234-235):

> "..... We have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty, and until further action by Congress. Cross v. Harrison, above cited. . . . For instance, it is clear that while a military commander during the civil war was in the occupation of a Southern port, he could impose duties upon merchandise arriving from abroad, it would hardly be contended that he could also impose duties upon merchandise arriving from ports of his own country. His power to

administer would be absolute, but his power to legislate would not be without certain restrictions--in other words, they would not extend beyond the necessities of the case. Thus in the case of The Admittance; Jecker v. Montgomery, 13 How. 498, it was held that neither the President, nor the military commander, could establish a court of prize, competent to take jurisdiction of a case of capture, whose judgments would be conclusive in other admiralty courts. It was said that the courts established in Mexico during the war 'were nothing more than agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property, while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize,' although Congress, in the exercise of its general authority in relation to the national courts, would have power to validate their action. The Grapeshot, 9 Wall. 129, 133.

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"'. . . It is an unbending rule of law, that the exercise of military power, where the rights of the citizens are concerned, shall never be pushed beyond what the exigency requires.'"

French v. Weeks, 259 U.S. 326 (1921) involved action by an army classification board, and indicates a recognition of the power of the President as Commander-in-Chief to interfere with the conclusions reached by that board. The Court said, in speaking of the statute involved (p. 333):

"But both the meaning and purpose of the entire expression seem very clear. The declaration that the finding of the Final Classification Board shall be 'final and not subject to further revision' could not be more emphatically worded, while the exception 'upon the order of the President' is in such general terms that it

plainly contemplates only discretionary action on his part to be taken, on the suggestion of the Secretary of War in special cases, on the application of officers involved or their friends, or on his own 'mere motion.' The exception plainly enough was inserted, not for the purpose of imposing a very great burden upon the President, but rather as a congressional recognition of the right in him as the Chief Executive and Commander-in-Chief of the Army (a right which he probably would have had without it), to interfere in such cases at his option, leaving the finding of the Board to become final should he elect not to take any action, and perhaps, also, for the purpose of forestalling the chance of its being successfully argued that the unusual finality--'not subject to further revision'--given to the finding of the Board, was intended to place such finding beyond the power of interposition in any case by the President. This construction gives consistent effect to each clause of the provision and that contended for by the relator must be denied."

An excellent summary of martial law is thus set forth in Ex parte Lavinder, 88 W. Va. 713 (24 A.L.R. 1178), involving the confinement of a person by military authorities (pp. 1180-1181):

"The substitution of military for the civil law in any community is an extreme measure. Socially, economically, and politically, it is deplorable and calamitous. Its sole justification is the failure of the civil law fully to operate and function, for the time being, by reason of the paralysis or overthrow of its agencies, in consequence of an insurrection, invasion, or other enterprise hostile to the state, and resulting in actual warfare. And then such substitution at any place within the state cannot extend beyond the limits of the theater of actual war. State ex rel. Nance v. Brown, 71 W. Va. 519, 45 L.R.A. (N.S) 996, 77 S. E. 243, Ann. Cas. 1914C, 1; Re Jones, 71 W. Va. 567, 45 L.R.A. (N.S.) 1030, 77 S. E. 1029, Ann. Cas. 1914C, 31. Martial law within the territory of a country at war with another, or with rebellious citizens or subjects in possession of a part of its own territory, is not a necessary incident or consequence of an existing state of war. A concrete illustration of this proposition is found

in the late World War. Though there were millions of men under arms in the United States, not a foot of its territory was subjected to martial law on the ground of the existence of the state of war between this country and certain European governments; nor, under principles declared in Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281, could it have been, because there was no actual warfare in this country--no fighting, no battle lines, no area in which troops were assembled or moved to and fro, in the conduct of or preparation for immediate or probable combat. In the great Civil War, portions of the country lying without the theater of actual war, as here indicated, were constitutionally immune from martial law. Ex parte Milligan, cited.

"It is perfectly manifest that the proclamation of war did not ipso facto, or ex proprio vigore, inaugurate martial law in Mingo county. The governor's attempt to inaugurate it and put it into effect in that county, in the manner hereinbefore described, was clearly futile and inoperative. The irresistible logic of the precedents already cited, and of all others bearing upon the subject, is that martial law is an incident of military operations within the area of actual, not merely theoretical, warfare. Being only an incident of actual warfare, such warfare is essential to its existence; and, being also a mere incident of actual military occupation of territory, an army in the field is equally essential and indispensable. No precedent, text, or judicial opinion found in the books accords to martial law of the kind now under consideration a wider scope or larger function than that just indicated. Upon the theory of the procedure under which these arrests were made, a citizen of revolting or enemy territory might be guilty of many infractions of martial law long before accrual of the power to make it effective. As an incident of the Civil War, that theory, if applied, might have piled up against a citizen of Georgia a three or four years' accumulation of offenses under Federal military regulations of which he had no knowledge, and required him to suffer imprisonment or other punishment for them on the arrival of Federal troops within the state. There could have been no American martial law in Cuba, Porto Rico, the Philippine Islands, or Germany until the American troops actually occupied those countries, and then it was limited to the territories in actual occupation. It is a purely military measure, and its administration a strictly military function. To say the military chief may prescribe it and then devolve its enforcement upon the civil officers of the territory involves a serious departure from logic, as well as a contradiction in terms. It is as truly military in its administration as in its origin, nature, and institution, or proclamation."

IV

OPINIONS OF THE ATTORNEY GENERAL

In 11 Op. A. G. 297 (1865), the Attorney General ruled that the assassins of President Lincoln, whom he denominated as public enemies, could be tried by a military court. While martial law had been declared in the District of Columgia, the opinion states that the civil courts were open and functioning. Among other things the Attorney General said (pp. 316-317):

> "The law of nations, which is the result of the experience and wisdom of ages, has decided that jayhawkers, banditti, &c., are offenders against the laws of nature, and of war, and as such amenable to the military. Our Constitution has made those laws a part of the law of the land. Obedience to the constitution and the law, then, requires that the military should do their whole duty; they must not only meet and fight the enemies of the country in open battle, but they must kill or take the secret enemies of the country, and try and execute them according to the laws of war. The civil tribunals of the country cannot rightfully interfere with the military in the performance of their high, arduous, and perilous, but lawful duties. That Booth and his associates were secret active public enemies no mind that contemplates the facts can doubt. The exclamation used by him when he escaped from the box on to the stage, after he had fired the fatal shot, sic semper tyrannis, and his dying message, 'say to my mother that I died for my country,' show that he was not an assassin from private malice, but that he acted as a public foe. Such a deed is expressly laid down by Vattel, in his work on the law of nations, as an offence against the laws of war, and a great crime. 'I give, then, the name of assassination to a treacherous murder, whether the perpetrators of the deed be the subjects of the party whom we cause to be assassinated or of our own sovereign, or that it be executed by any other emissary introducing himself as a suppliant, a refugee, or a deserter, or, in fine, as a stranger.' (Vattel, 339.)

"Neither the civil nor the military department of the government should regard itself as wiser and better than the Constitution and the laws that exist under or are made in pursuance thereof. Each department should, in peace and in war, confining itself to its own proper sphere of action, diligently and fearlessly perform its legitimate functions, and in the mode prescribed by the Constitution and the law. Such obedience to and observance of law will maintain peace when it exists, and will soonest relieve the country from the abnormal state of war.

"My conclusion, therefore, is, that if the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did, and whether they did or not is a question to be decided by the tribunal before which they are tried, they not only can, but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war, it would be as palpably wrong for the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle."

It is doubtful whether the above opinion can stand the obvious challenge of Ex parte Milligan, supra.

In 29 Op. A. G. 322, the Attorney General advised the President he lacked power to send the militia into a foreign country. He did, however, say (pp. 323-324):

"When the Constitution gives to Congress the power 'to raise and support armies,' and to provide 'for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions,' and makes the President 'the Commander in Chief of the Army and Navy of the United States, and the militia of the several States when called into the actual service of the United States,' it is speaking of two different bodies--the one the Regular Army, in the continuous service of the Government, and liable to be called into active service at any time, or in any place where armed force is required; and the other a body for domestic

service, and liable to be called into the service of the Government only upon the particular occasions named in the Constitution. And acts of Congress relating to the Army and the militia must have the same construction.

"It is certain that it is only upon one or more of these three occasions--when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States--that even Congress can call this militia into the service of the United States, or authorize it to be done.

"As 'insurrection' is necessarily internal and domestic, within the territorial limits of the Nation, this portion of the sentence can afford no warrant for sending the militia to suppress it elsewhere. And even if an insurrection of our own citizens were set on foot and threateningly maintained in a foreign jurisdiction and upon our border, to send an armed force there to suppress it would be an act of war which the President can not rightfully do.

"The term 'to repel invasion' may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term 'to repel invasion.'

"Then, too, if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling an invasion.

"But this is quite different from and affords no warrant for sending the militia into a foreign country in time of peace and when no invasion is made or threatened."

In 28 Op. A. G. 511, it was held that the President lacked power to remove a floating dry dock from Algiers, Louisiana, to the naval station at Guantanamo, Cuba, where it would better serve naval purposes. The opinion, however, thus recognizes that in an emergency the President could exercise such power (pp. 521-522):

> " . . . Furthermore, it will be observed from the report of the Secretary of the Navy, above quoted, that in locating dry docks and repair shops it was desirable to place them as far as possible 'at great commercial and industrial centers, not only because workmen and material can be obtained more readily and more reasonably at such points, but also because such points require and will have, from their importance to the country, a strong land defense; and, as the docks also require a strong defense, one set of fortifications will cover both civil and military property.'
>
> "It is clear that Congress had these considerations in mind when it directed the floating dry dock in question 'to be located at the naval reservation at Algiers, Louisiana,' and that the language used was directory and not merely descriptive. This being so, I do not think the power of the President as Commander-in-Chief of the Army and Navy would authorize him to disregard the mandate of Congress as to where the structure should be located, at least in the absence of an emergency making such action imperative for the protection of the interests of the Government, such as might arise in time of war or public danger. . . ."

In 38 Op. A. G. 293 (1935), the facts and ruling were as follows:

> "The proposed order effects an interchange of certain property between the War and Navy Departments in California, Hawaii, and the District of Columbia. This proposed interchange of property has been agreed to by the Acting Secretary of the Navy and the Acting Secretary of War, as appears from their letter to you

of September 24, 1935, and it is my view that the order is authorized under the following provision of the Act of July 11, 1919, 41 Stat. 131, 132:

"The interchange without compensation therefor, of military stores, supplies, and equipment of every character, including real estate owned by the Government, is hereby authorized between the Army and the Navy upon the request of the head of one service and with the approval of the head of the other service.'

"Since the proposed interchange of property is in the interest of the national defense it is probable that you also have authority to issue the order as Commander in Chief of the Army and the Navy."

In an opinion dated August 29, 1940, the Attorney General advised the President that he possessed power to transfer certain old naval vessels to Great Britain and to negotiate for certain naval bases. He said, among other things (pp. 2-3, 6-7):

"There is, of course, no doubt concerning the authority of the President to negotiate with the British Government for the proposed exchange. The only questions that might be raised in connection therewith are (1) whether the arrangement must be put in the form of a treaty and await ratification by the Senate or (2) whether there must be additional legislation by the Congress. Ordinarily (and assuming the absence of enabling legislation) the question whether such an agreement can be concluded under Presidential authority or whether it must await ratification by a two-thirds vote of the United States Senate involves consideration of two powers which the Constitution vests in the President.

"One of these is the power of the Commander in Chief of the Army and Navy of the United States, which is conferred upon the President by the Constitution but is not defined or limited. Happily, there has been little occasion in our history for the interpretation of the powers of the President as Commander in Chief of the Army and Navy. I do not find it necessary to rest upon that power alone to sustain the

present proposal. But it will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the utilization of the naval and air weapons of the United States at their highest efficiency in our defense. It seems equally beyond doubt that present world conditions forbid him to risk any delay that is constitutionally avoidable.

* * * * *

"So far as concerns this statute, in my opinion it leaves the President as Commander in Chief of the Navy free to make such disposition of naval vessels as he finds necessary in the public interest, and I find nothing that would indicate that the Congress has tried to limit the President's plenary powers to vessels already stricken from the naval register. The President, of course, would exercise his powers only under the high sense of responsibility which follows his rank as Commander in Chief of his Nation's defense forces.

"Furthermore, I find in no other statute or in the decisions any attempted limitations upon the plenary powers of the President as Commander in Chief of the Army and Navy and as the head of the State in its relations with foreign countries to enter into the proposed arrangement for the transfer to the British Government of certain over-age destroyers and obsolescent military material except the limitations recently imposed by section 14 (a) of the act of June 28, 1940 (Public, No. 671). This section, it will be noted, clearly recognizes the authority to make transfers and seeks only to impose certain restrictions thereon. The section reads as follows:

"'Sec. 14. (a) Notwithstanding the provision of any other law, no military or naval weapon, ship, boat, aircraft, munitions, supplies, or equipment, to which the United States has title, in whole or in part, or which have been contracted for, shall hereafter be transferred, exchanged, sold, or otherwise disposed of in any manner whatsoever unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military material, shall first certify that such material is not essential to the defense of the United States.'

"Thus to prohibit action by the constitutionally created Commander in Chief except upon authorization of a statutory officer subordinate in rank is of questionable constitutionality. However, since the statute requires certification only of matters as to which you would wish, irrespective of the statute, to be satisfied, and as the legislative history of the section indicates that no arbitrary restriction is intended, it seems unnecessary to raise the question of constitutionality which such a provision would otherwise invite."

V

THE STATUTES

Over the years, Congress, presumably acting pursuant to what it regarded as its various war powers, has undertaken to enact statutes conferring upon the President detailed powers in time of war, threatened danger, or great national emergency, which powers would seem to inhere in the office of Commander in Chief. Some of those statutes are set forth in the letter of the Attorney General dated October 4, 1939, advising the Senate in response to its resolution, calling for information as to the existing war or emergency powers. Listed here are typical statutes which might reasonably be regarded as mere legislative affirmations of war and national emergency powers Constitutionally possessed by the President as Commander in Chief:

"Section 30, act of June 3, 1916, 39 Stat. 187, as amended (U.S.C., title 10, sec. 343), authorizing members of the Regular Army Reserve to be ordered to active duty 'in case of emergency declared by the President.'

"Section 32, act of June 4, 1920, 41 Stat. 776 (U.S.C., title 10, sec. 569), authorizing the President to order Reserve officers of the Army to active duty for more than 15 days in a calendar year, without their consent, 'in time of a national emergency expressly declared by Congress.'

"Section 35, act of June 4, 1920, 41 Stat. 780 (U.S.C., title 10, sec. 426), authorizing the President to place members of the enlisted Reserve Corps on active duty for a longer period than 15 days in a calendar year, without their consent, 'in time of a national emergency expressly declared by Congress.'

* * * * *

"Act of July 5, 1884, 23 Stat. 109, as amended (U.S.C., title 10, sec. 1200), authorizing certain discretion in the purchase of supplies for the Army 'in cases of emergency.'

"Act of March 2, 1901, 31 Stat. 905 (U.S.C. title 10, sec. 1201), authorizing purchase of supplies for the Army without advertising 'in cases of emergency.'

"Act of August 29, 1916, 39 Stat. 645 (U.S.C., title 10, sec. 1361), authorizing the President, through the Secretary of War, to take possession and assume control of any system or systems of transportation or any part thereof 'in time of war.'

"Act of February 4, 1887, 24 Stat. 380, as amended (U.S.C., title 10, sec. 1362), providing for preference to shipments of troops and material of war upon demand of the President 'in time of war or threatened war.'

"Act of July 5, 1884, 23 Stat. 110, as amended (U.S.C., title 10, sec. 1364), waiving the requirement of advertising in connection with purchases of transportation equipment by the Army 'in cases of extreme emergency.'

"Act of June 4, 1920, 41 Stat. 811 (U.S.C., title 10, sec. 1590), providing for dismissals of officers of the Army in time of war.

* * * * *

"Section 1, act of May 22, 1918, 40 Stat. 559 (U.S.C., title 22, sec. 223), authorizing the President to impose additional restrictions and prohibitions upon the departure of persons from and their entry into the United States 'when the United States is at war.'

* * * * *

"Section 38, act of June 3, 1916, 39 Stat. 190, as amended (U.S.C., title 32, sec. 81c), authorizing the President to the extent provided for by appropriations for the specific purpose to order officers of the National Guard of the United States to active duty 'in an emergency' at any time and for the period thereof, provided that except in time of a national emergency expressly declared by the Congress, no officer of the National Guard shall be employed on active duty for more than 15 days in any calendar year without his consent.

* * * * *

"Section 1624, art. 36, R.S., as amended (U.S.C., title 34, sec. 1200, art. 36), providing for dismissals of officers of the Navy in time of war.

* * * * *

"Act of July 9, 1918, 40 Stat. 861 (U.S.C., title 40, sec. 37), authorizing theSecretary of War to rent or lease any building or part thereof in the District of Columbia that may be required for military purposes 'in time of war, or when war is imminent.'

* * * * *

"Act of July 1, 1902, 32 Stat. 713, as amended (U.S.C., title 42, sec. 8), authorizing the President to utilize the Public Health Service 'in times of threatened or actual war.'

* * * * *

"Section 606, act of June 19, 1934, 48 Stat. 1104 (U.S.C., title 47, sec. 606), authorizing the President to suspend or amend rules and regulations applicable to transmission of communications by radio or wire, etc., 'upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States;' also to require priority for communications

essential to the national defense 'during the continuance of war in which the United States is engaged.'

* * * * *

"Section 402, act of February 28, 1920, 41 Stat. 476-477 (U.S.C., title 49, sec. 1 (15), authorizing the Interstate Commerce Commission to direct preferences and priorities upon certification by the President that such preferences and priorities are essential to the national defense and security 'in time of war or threatened war.'

* * * * *

"Section 6, act of June 15, 1917, 40 Stat. 219 (U.S.C., title 50, sec. 38), authorizing the President to designate prohibited places under the provisions relating to espionage 'in time of war or in case of national emergency.'

"Act of June 3, 1916, 39 Stat. 213 (U.S.C., title 50, sec. 80), providing for the procurement of war materials 'in time of war or when war is imminent,' and authorizing the President to appoint a Board on Mobilization of Industries Essential to Military Preparedness.

* * * * *

"Act of July 2, 1917, 40 Stat. 241, as amended (U.S.C., title 50, sec. 171), providing for the acquisition of land for military purposes 'in time of war or the imminence thereof.'

* * * * *

"Act of April 11, 1898, 30 Stat. 737 (U.S.C., title 50, sec. 178), authorizing the President to order the erection of any temporary fort or fortification upon the written consent of the owner of the land upon which such work is to be placed 'in case of emergency.'"

A more recent example of Federal legislation which, if strictly construed, might constitute an interference with the power to defend our Country against an aggressor is found in Section 1 of the Act of August 27, 1940 (U.S.C. Title 50,

Sec. 401, "Cumulative Annual Pocket Part).

In authorizing the President to call into active military service, "any and all members and units of any or all reserve components of the Army of the United States," it is then provided that such persons "shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands." If this statute should be construed, according to its letter, as meaning that the President as Commander in Chief could not, if he deemed it essential, use the troops covered by the statute, in advancing outside the limits of our hemisphere, for the purpose of stopping and annihilating the enemy known to be on his way to our shores by boat or airplane, then a serious Constitutional question would be presented. Stated somewhat differently, the statute requires that it be subject to the power of the President, in the exercise of his military authority in a real emergency, to use the specified troops beyond the limits of the Western hemisphere. He is not bound to wait until the enemy actually breaks through our shore line doorways. No such impotence inheres in the office of Commander in Chief.

VI

He who uses this memorandum will find it helpful to read in their entirety the following three legal articles:

7 Journal of American Institute of Criminal Law and Criminology, pp. 248 and 585, particularly commencing at page 585 entitled "Powers of President". This article was prepared by George Melling in the office of the Judge Advocate General, U. S. Navy.

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45 Political Science Quarterly, p. 1 (1930), entitled "War Powers of the President", etc.

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8 George Washington Law Review, December, 1939, pp. 157-182, entitled "War Powers".

HARRY S. RIDGELY

December 18, 1940